SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 1183.

HENRY W. BENJAMIN, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 17, 1880.

(16,319.)

(16,319.)

SUPREME COURT OF THE UNITED STATES.

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HENRY W. BENJAMIN, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1897.

a UNITED STATES OF AMERICA,
Fifth Judicial District.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of November, A. D. 1895, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable Alex. Boarman, United States district judge for the western district of Louisiana, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

Be it remembered that heretofore, to wit, on the 22nd day of February, 1896, a transcript of the record of this cause from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of said United States circuit court of appeals for the fifth judicial circuit in the words and figures following, to wit:

1 HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* No. 11983. In Equity.

Bill of Complaint.

Filed Feb'y 9th, 1891.

To the judges of the circuit court of the United States for the eastern district of Louisiana:

Henry W. Benjamin of New Orleans, an alien and a subject of the Kingdom of Great Britain, brings this his bill against the City of New Orleans, a municipal corporation, created by the laws of the State of Louisiana and a citizen of said State; the City of Kenner, also a municipal corporation created by the laws of and a citizen of said State; the Police Jury of the Parish of Jefferson and the Police Jury of the Parish of St. Bernard, political corporations created by the laws of and citizens of said State. And thereupon your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74) approved September 14, 1868, the parishes of Orleans, Jefferson and St. Bernard, were territoril-y united in one district for the purpose of police government therein, called the "Metropolitan police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners, styled the "board of Metropolitan police."

2nd. That said board was required to appoint all the officers and

employees of the police force, required in said district, and their salaries, which were prescribed by the act, were required to be paid monthly; that by said act, and acts of said legislature, supplementary to and amendatory thereof, said board was required to make, annually, an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes, within said district, and said cities and parishes, were required by said acts to promptly pay, *and to provide the means for promptly paying*, the amounts thus apportioned to them.

3rd. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within
2 said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said metropolitan police, and apportioned the same to said several cities and parishes as required by said acts.

4th. That the apportionments made by said board, as aforesaid, to the city of New Orleans were as follows, viz:

For the year 1869	$877,595 00
For the year 1870	838,274 07
For the year 1871	809,932 19
For the year 1872	724,460 90
For the year 1873	718,017 00
For the year 1873 additional	203,600 65
For the year 1874	713,208 40
For the year 1874 additional	182,886 53
For the year 1875	587,723 00
For the year 1876	500,000 00
Total	$6,155,697 74

and when said apportionments were made and notified, as they were, to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses were made by said board, to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board; but afterwards, by acts of said legislature, said cities were consolidated with the city of New Orleans, which, by said acts of consolidation, was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers, upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard, and the city of Kenner, all within said police district, and notice

given to each of said corporations thereof as required by law,
3 and thereupon they became and were absolutely liable to said board for the amounts of their respective apportionments, but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

7th. That while said cities and parishes, within the police district, were required to "promptly pay and to provide the means for promptly paying" their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amounts required for that purpose by levying taxes upon the persons and things subject to taxation, within their respective jurisdictions, and for that purpose did severally make such levies, but whether for sufficient amounts to meet their respective liabilities complainant is unable to state; but he avers that said city of New Orleans, annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority, levied taxes for the purpose of paying the same; and collected and paid upon account of her apportionments large sums of money, but not enough to discharge her liability in the premises; there still being due upon account thereof the sum of nine hundred and forty thousand three hundred and seventy-nine and $\frac{66}{100}$ dollars, and the defendant, the present City of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

8th. That by the provisions of an act of said legislature approved February 7, 1869, and subsequent acts, all warrants issued in payment of salaries of officers, employees, and members of the Metropolitan police, and for the expenses of said board were made receivable for all parish and municipal taxes and licenses, within the limits of the Metropolitan police district, and for all debts due or to become due to the parishes and cities within said district, not exceeding in any one year the amount of their respective apportionments for that year.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metro-
4 politan police force in said district, and appointed and employed the officers and members thereof, who entered upon their duties and rendered services, under contracts therewith, to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

10th. That by an act of said legislature, (No. 35) approved March 31, 1877, said act No. 74, of September 14, 1868, establishing said Metropolitan police district, said act No. 44 of February 27, 1869, making all warrants issued in payment of Metropolitan police salaries, and expenses, receivable for all municipal and parish taxes within the district; said act No. 94 of March 30, 1870, requiring the several cities and parishes within the district, to pay and provide

the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16 of March 24, 1875, entitled "An act, to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes," as well as all other acts amendatory of said above-enumerated acts, or upon the same subject-matter, were repealed; and said board of Metropolitan police was abolished, and no provision was made for the liquidation of its affairs or the payment of its debts.

11th. That said repealing act was in violation of section 10, article 1 of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police, with its officers and employees, and others, to whom it was indebted, and who had contracted with and rendered services to said board, upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid, from the several cities and parishes within said district, out of which funds only, they could be paid and to that extent said act was and is null and void.

12th. That said city of New Orleans has from day to day and from year to year, ever since the passage of the repealing act of March 31, 1877, aforesaid, continued to collect the taxes levied as aforesaid, for the purpose of paying the apportionments of said city for police expenses, so as aforesaid made, and notified thereto; and is now making such collections, and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, which is applicable to the payment of said city's indebtedness to said board of police and ought to be distributed among the creditors of said board, in reduction of their claims, including those of your orator.

13th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws, ceased to be, and has no representative or successor, against whom suit might have been or may be brought for the establishment of the demands of the complainant herein, and he is remediless, except in the honorable court where matters of this nature are cognizable and relievable; wherefore he brings this, his bill, in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expenses of this suit.

14th. That said board being abolished, and without any successor or representative as aforesaid, and said city of New Orleans having collected a large sum of money, to wit, the sum of $— raised by taxation for and applicable to the payment of its apportionments of police expenses for the year- 1874, 1875 and 1876, Abraham Brittin, a creditor of said board of Metropolitan police applied to the civil district court for the parish of Orleans, Louisiana for the appointment of a receiver of said board for said funds and said city consenting thereto, by the order and decree of said court, Richard F. Harrison was appointed such receiver; that in such capacity he brought suit against the city of New Orleans, for the recovery of such taxes as had been collected

by the city, for said years, for account of said Metropolitan police board, and by the judgment of the supreme court of Louisiana (40 Louisiana Annual Reports, p. 512) recovered from said city upon that account, the sum of $30,944.94 and afterwards, to wit: the — day of July, 1888 said city paid to said receiver the amount of said judgment, the proceeds whereof said receiver on the 25th day of July, 1888, paid to and distributed among the holders of
6 claims against said board, and afterwards said city voluntarily paid to said receiver without suit sundry other small sums derived from the collection of such taxes for the purpose of having the same applied to the payment of the liabilities of said board, but the amount of such payments is unknown to complainant, but upon information and belief, he avers, that it does not exceed one thousand dollars. And complainant further shows that afterwards, to wit: on the 27th day of December, 1890, said Harrison died, and afterwards Joseph P. Hornor was appointed receiver in his stead, but his appointment was rescinded before he acted and said board of Metropolitan police is now without any successor, or legal representative, and its affairs are no longer under any administration whatsoever.

15th. That one Lew Goldstein as holder of a large amount of Metropolitan police warrants, issued to officers and members of the Metropolitan police, and as assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against all the corporations made defendants herein, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver, and the enforcement of the liabilities of said several defendants for the purpose of paying and discharging the obligations of said board and citations were served the 26th of October upon each of said defendants, to appear and answer in said suit, and afterward said suit was removed into this hon. court, where holders of warrants and claims against said board amounting to $— appeared before the master, under the orders of the court, and proved their demands, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans, was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof, but as to all the other defendants the same still remains pending and undisposed of.

16th. That your orator is the holder and owner, of Metropolitan police warrants, certificates, and claims against said board of
7 Metropolitan police, said warrants and certificates having been issued by said board for services rendered, and supplies furnished, and said claims being for services rendered and supplies furnished thereto, under contract therewith, a list of said warrants, certificates and claims amounting to $5,032.90, being annexed hereto as Exhibit A and made part of this bill; that all of said warrants, certificates and claims, were included among those held and sued upon by said Lew Goldstein, in his above-named suit, your orator

having since acquired the same which still remain due and unpaid.

17th. And your orator further shows and avers that there are now outstanding due and unpaid warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it for services rendered and supplies furnished thereto, a large amount, the exact sum thereof being unknown to your orator; but he avers upon information and belief, that, including interest thereon, the amount exceeds two hundred thousand dollars; that said several cities and parishes within the police district being required by law to receive in payment of all taxes and licenses and debts due to them the warrants issued by said board as aforesaid, and by the act of the legislature No. 33, approved February 26th, 1874, all restrictions upon the amount to be so received were removed; and it is claimed by the city of New Orleans that in consequence thereof she received more of such warrants in payment of her taxes than her just proportion. And your orator avers, that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by said City of New Orleans and by the other defendants, as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined, and paid out of said assets; and if the same exceed the liabilities of the board, that said defendants be required to pay their *pro rata* shares thereof.

In consideration whereof and inasmuch as your orator has
8 not a complete and adequate remedy at law: To the end therefore, that the said defendants may, if they can, show why your orator should not have the relief thereby prayed, and that they and each of them may full, true and perfect answer make, to all and singular the premises (but not under any oath, the same being waived), that an account may be taken under the direction of this honorable court, before one of the masters thereof or otherwise as the court may direct, of all the debts, liabilities, and unpaid dues of every kind, of said board of Metropolitan police including the warrants, certificates and claims of your orator, and of all others who may come in and avail themselves of the decree to be made herein, and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them, and withheld from said board; and that said defendants be decreed to pay into the hands of some discreet person, to be appointed receiver by this honorable court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized, be applied to the payment of your orator's said warrants, certificates and claims and of such other persons as may be creditors of said board and who shall come

in and establish their claims, and also to the payment of interest thereon, and all expenses of administration and costs.

May it please your honors to grant unto your orator, writs of subpœna directed to said city of New Orleans, to said city of Kenner, to said police jury of the parish of Jefferson and to the said police jury of the parish of St. Bernard, all municipal corporations of the State of Louisiana, therein and thereby commanding them and each of them, on a day to be named and under a certain penalty therein specified, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to abide and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further, and general
9 relief as the nature of the circumstances of the case may require, and as to equity and good conscience may be agreeable.

And your orator will ever pray, etc.

(Signed) ROUSE & GRANT,
Solicitors for Complainant.

(Signed) CHARLES LOUQUE, *Of Counsel.*

EXHIBIT "A," Annexed to Bill of Complaint, Being List of Transferrers of Warrants Sued on.

Filed Feb'y 9th, 1891.

METROPOLITAN POLICE, DECEMBER, 1874. CITY.

No. 1965—M. Dore, operator 7th sub. prt.,	Dec'r, '74...		118 90
" 888—F. Peters, " 3d prct.	Nov'r.....		115 06
" 272—J. Johnson, corp'l 5th "	Dec'r		93 42
" 277—J. Ward, No. 338, harbor	"		79 45
" 316—J. P. Martin, No. 149, 3d prct.	"		73 97
" 271—E. C. Vankork, corp'l, harbor	"		93 42
" 374—G. H. Hennershy, " 1st	"		90 41
" 389—John Spaulding, No. 76, 1st	"		84 93
" 402—L. G. Excelson, No. 44	"		76 71
" 420—P. H. Lewis, No. 82	"		84 93
" 423—J. B. Smith, No. 26	"		73 97
" 456—Joe Gray, capt'n 6th	"		152 87
" 474—J. L. Smith, det. supt. office	"		118 90
" 503—O. Rey, captain	"		152 87
" 508—Wm. Walsh, No. 343, harbor prect.	"		84 93
" 514—J. Dinace, No. 12, 1st "	"		84 93
" 517—S. Hale, No. 14, "	" "		52 05
" 537—A. J. Ward, No. 281, 6th "	"		84 93
" 538—J. Sullivan, No. 63, 1st "	"		84 93
" 588—F. Taylor, No. 102, 2nd "	"		79 45
" 596—J. Fiene, No. 372, sub'n	"		73 97
" 610—L. A. Thibaut, serg't 4th	.....		127 39
" 631—A. Rich, No. 176, "	"		73 97

No.	677—O. Rieffel, No. 239, 5th	Dec'r.....	76 71
"	680—J. R. Commons, No. 201, 5th	"	65 75
"	692—P. Gibney, No. 204, "	"	84 93
"	710—D. Demoullier, No. 219, "	"	84 93
	Carried forward.....		$2,468 68
10	Brought forward.....		$2,468 68
	No. 720—P. Clariss, No. 276, 6 prct.	Dec'r..	79 45
No.	838—A. Clavin, No. 347, harbor	" ..	84 93
"	861—Z. Jones, No. 115, 2nd	" ..	73 97
"	866—D. Kevlin, No. 103, 2nd	" ..	84 93
"	870—Geo. Haenchen, No. 143, 3rd	" ..	82 19
"	878—M. Hersro, No. 118, "	" ..	57 53
"	939—D. C. Hennessy, doorman supt. office	" ..	50 95
"	952—C. Labuzan, corp'l, 2nd prect.	" ..	93 42
"	960—John Palmers, No. 105, 2nd prect.	" ..	63 01
"	963—John Ford, No. 106, "	" ..	73 97
"	1089—H. Ginding, No. 166, "	" ..	32 87
"	1104—V. D. Egana, No. 155, 3d prect.	" ..	60 27
"	1166—L. Kiernan, No. 114, 2nd "	" ..	79 45
"	1177—J. Ferrand, No. 238, 5th "	" ..	54 79
"	1204—Thos. Fitzgerald, No. 18, 1st "	" ..	47 01
"	1209—W. Crothy, No. 30 "	" ..	82 19
"	1224—J. Gonzales, No. 161, 4th "	" ..	84 93
"	1422—Jas. Duffy, No. 94, 2nd "	" ..	84 93
"	1525—H. O. Shayer, No. 355, sub. prect.	" ..	84 93
"	1561—P. J. Isabell, No. 259, 6th prect.	" ..	84 93
"	1674—G. P. Schreiber, captain	" ..	152 87
"	1701—J. P. Montamat, " 3rd	" ..	102 87
"	1712—Thos. Flanagan, " 1st	" ..	152 87
"	1751—Eli Jones, No. 83. "	" ..	30 13
"	1758—M. Nolan, No. 121, 3d	" ..	60 27
"	1970—J. B. Ballard, No. 255, 6th	" ..	84 93
"	2073—J. H. Thompson, No. 100, 2nd	" ..	69 03
			$4,562 30
	Brought forward.....		4,562 30
No.	613—D. Ralti, operator, 4th December.....		95 89
No.	889—F. Peters, operator, 3d December.....		118 90
No.	180—W. Hereford, No. 265, 6th December.....		16 71
No.	64—M. Cazzens, No. 123, 3d December..... ..		84 93
No.	44—E. W. Sewell, operator, 3d December.....		118 90
No.	59—J. Lynch, No. 88, 1st December		35 27
			$5,032 90

Amendment of Bill.

Filed April 27, 1895.

United States Circuit Court, Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
THE CITY OF NEW ORLEANS *et al.* } No. 11983.

11 By leave of court first had and obtained, the complainant comes now and amends his bill herein by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph thereof, on page 14 of said bill, the following averment, viz: "And your orator avers that *each* of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

Wherefore, complainant prays as he hath already prayed, and that said defendants be required to answer this amendment, on or before the next rule day, and for general relief.

(Signed) ROUSE & GRANT,
Solicitors for Comp't.

Order.

Let this amendment be filed; a copy thereof served upon the defendant, and let the city of New Orleans plead or answer the same on or before the next rule day after such service.

New Orleans, April 27, 1895.

(Signed) DON A. PARDEE, *Judge.*

Demurrer.

Filed May 6, 1895.

United States Circuit Court.

H. W. BENJAMIN
vs.
THE CITY OF NEW ORLEANS. } No. 11983.

Demurrer of the City of New Orleans to the bill of complaint of H. W. Benjamin, complainant.

12 This defendant by protestation not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of to be true in manner and form, as

the same are therein and thereby set forth and alleged, says that it is advised that there is no matter or thing in the complainant's said bill of complaint contained, good and sufficient in law to call this defendant to account in this honorable court for the same; but that there is good cause of demurrer thereunto, and it does demur thereunto accordingly, and for causes of demurrer says:

That the complainant's said bill of complaint in case the same were true, which this defendant does in nowise admit, contains not any matter of equity, whereon this court can ground any decree, or give the complainant any relief or assistance as against it, this defendant.

And for further cause of demurrer, this defendant specially says:

That the court has no jurisdiction because on the questions certified by the circuit court of appeals to the Supreme Court of the United States, that court determined that the bill stated no case of equity arising under the Constitution and laws of the United States, cognizable in this court, and no case of diverse citizenship, and that no such last case could be stated, and under such determination by the Supreme Court, this court has no jurisdiction, save to dismiss the bill.

That the jurisdiction of this court, of suits on the Metropolitan certificates or warrants, and claims against the Metropolitan police board sued on, is prohibited by the 2nd section of the act of Congress of ——, 1888, 24th Statutes at Large.

That it is manifest by the bill that if the complainant has any cause of complaint in respect to the Metropolitan warrants, certificates and claims against the Metropolitan police board he claims to have acquired; his remedy is perfect, adequate and complete at law against the city of New Orleans, and not in equity.

That if this court had any jurisdiction to allow or entertain said amendment or said bill, the said amendment is defective, and not sufficient to require this defendant to plead or answer thereto, it being essential that the amendment should state the names and residences and citizenship of the persons to whom the war-
13 rants and certificates issued, and to whom accrued the claims against the Metropolitan police board, who are averred by the amendment to be now and to have been citizens of States other than Louisiana, on the 25th of March, 1891, and whose aforesaid warrants, certificates and claims, the amendment alleges the complainant acquired; and said statement, besides being essential as a jurisdictional averment in the bill, is requisite also to apprise defendant of the testimony proposed to be offered, and enable the defendant to controvert by testimony the said allegations of citizenship in the vague and general terms of the amendment.

Wherefore, and for divers other errors and defects in the complainant's said bill of complaint contained, and appearing on the face thereof, this defendant does, as aforesaid, demur in law thereunto, and humbly craves the judgment of this honorable court, whether it is compellable, or ought to make any answer thereunto otherwise than as aforesaid, and this defendant humbly prays to be

hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

Personally appeared John Fitzpatrick, mayor of the city of New Orleans, who, being duly sworn, deposes and says that he is the mayor of the city of New Orleans, and that the above demurrer is not interposed for delay.

(Signed) JOHN FITZPATRICK.

Sworn to and subscribed before me this 6th day of May, A. D. 1895.

[SEAL.] (Signed) CAS. H. SHIELDS, *Not. Pub.*

Endorsed: And now comes Henry W. Benjamin, the complainant, by Rouse & Grant, his solicitors, and sets down the within demurrer for argument. N. O., May 23, '95. (Signed) Rouse & Grant, sol'rs.

14 *Decree Dismissing Bill.*

Entered and filed January 20, 1896.

United States Circuit Court, Eastern District of Louisiana.

HENRY W. BENJAMIN *et als.* *vs.* THE CITY OF NEW ORLEANS. } No. 11983. In Equity.

This cause came on to be heard at a former day upon the demurrer filed May 6, 1895, by The City of New Orleans, defendant, to the bill of complaint as amended, and after argument from the solicitors for the parties respectively was submitted and taken under advisement.

On consideration whereof, it is ordered, adjudged and decreed that the said demurrer be maintained and the bill of complaint dismissed with costs.

(Signed) CHARLES PARLANGE, *Judge.*

New Orleans, January 20th, 1896.

Motion and Order for Appeal.

Filed January 27, 1896.

United States Circuit Court for the Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* } No. 11983.

On motion, in open court, of Rouse and Grant, solicitors for the complainant in the above cause, suggesting error to the prejudice of the complainant, in the final decree rendered, and signed in said cause January 20th, 1896, as set forth in the assignment of errors filed herewith and made a part of this motion; and that complainant desires to have said decree reviewed—

It is now ordered that an appeal herein be allowed to said complainant, returnable to the United States circuit court of appeals for the fifth circuit within thirty days, and according to law, upon his furnishing bond with solvent surety, in the sum of two hundred and fifty dollars, and conditioned as the law directs.

(Signed) CHARLES PARLANGE, *Judge.*

New Orleans, Jan'y 27, 1896.

Assignment of Errors.

Filed, with motion for appeal, January 27, 1896.

United States Circuit Court for the Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* } No. 11983.

Complainant's assignment of errors.

1st. Said circuit court erred in sustaining the demurrer to the complainant's bill as amended, and in dismissing the same.

2nd. Said court erred in holding that complainant's bill as amended, does not state a case within the jurisdiction of a court of equity.

3rd. Said court erred in holding that complainant's bill as amended, does not state a case within the jurisdiction of said court.

4th. If said demurrer was well taken, said court erred in dismissing the bill absolutely, and should have dismissed it without prejudice.

Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed, and said cause reinstated to be proceeded with according to law.

(Signed) ROUSE & GRANT,
Solicitors for Compl't.

Bond for Appeal.

Filed January 27, 1896.

16 Know all men by these presents, that we, Henry W. Benjamin, as principal, and J. D. Rouse, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred and fifty dollars to be paid to the said City of New Orleans, La.. certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of January in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a session of the United States circuit court for the eastern district of Louisiana, in a suit depending in said court, between Henry W. Benjamin and said City of New Orleans, No. 11983 of the docket of said court, a decree was rendered against the said Henry W. Benjamin, and the said Benjamin having obtained an order granting him an appeal, and the same having been entered of record, to reverse the decree in the aforesaid suit, said appeal having been granted upon motion in open court, at the same term at which said decree was rendered, the said appeal being made returnable to the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Henry W. Benjamin shall prosecute his appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY W. BENJAMIN, [SEAL.]
By ROUSE & GRANT, *His Sol'rs.* [SEAL.]
(Signed) J. D. ROUSE. [SEAL.]

Approved by—

(Signed) CHARLES PARLANGE, *U. S. Judge.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 22 pages contain and form a full,
17 complete, true and perfect transcript of the record and proceedings had, on the trial of the demurrer to the bill of complaint as amended in the case of Henry W. Benjamin *vs.* The City of New Orleans *et als.*, No. 11983 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 20th day of February, A. D. 1896.

[SEAL.] E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate, as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 20th day of February, A. D. 1896.

CHARLES PARLANGE, *Judge.*

Opinion.

Filed January 20, 1896.

U. S. Circuit Court, Eastern District of Louisiana.

H. W. BENJAMIN *vs.* CITY OF NEW ORLEANS *et al.* } No. 11983.

Opinion on demurrer. Filed May 6, 1895.

PARLANGE, *J.:*

The mandate of the court of appeals to this court reverses the judgment of this court heretofore rendered herein and directs the dismissal of the bill unless, by proper amendment and in accordance with the views expressed by the supreme court in this case, the jurisdiction of this court be made to appear affirmatively. The complainant has amended his bill by averring that the 18 persons in whose favor the claims accrued and to whom the certificates were issued, are now and were on February 9th, 1891, (the date of the filing of the bill), citizens of States other than the State of Louisiana, and competent, as such citizens, to maintain suit in this court against the defendants for the recovery of the indebtedness represented by the certificates, if no assignment or transfer thereof had been made.

The States of which the original certificate-holders are averred to have been citizens at the time of the filing of the bill, are not named. Complainant's counsel referred in argument to a list of the certificate-holders filed with the bill as Exhibit A, but that list furnishes no information whatever as to the States of which the certificate-holders were citizens, and if any inference is to be drawn from the list, it is that the certificate-holders were citizens of Louisiana.

In this case four questions were submitted to the supreme court by the court of appeals, to wit (153 U. S. page 418):

First. "Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal repre-

sentative and no provision has been made for the application of its assets to the payment of its debts and the answer herein, constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the circuit court of the United States for the eastern district of Louisiana, without regard to the diverse citizenship of the parties?"

Second. "The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses taxes and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of article 1, section 10 of the Constitution of the United States?"

Third. "Do the pleadings show a suit to recover the con-
19 tents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the circuit court of the United States, to establish a fund out of which he, in common with other creditors of the late Metropolitan police board may be paid *pro rata* upon their claims?"

Fourth. "Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?"

The first question was answered in the negative; the third, in the affirmative; and while the second question was not answered directly, the language of the Supreme Court, 153 U. S., pages 429, 431 and 432, makes it clear that, if the court had deemed it necessary to directly answer the second question, the court would have answered it in the negative.

The grounds of equitable cognizance relied upon in this case were, after the citation of authorities believed by complainant's counsel to be applicable, set out in the brief of complainant's counsel filed in the Supreme Court, as follows (pages 14 and 15 of the brief):

"The destruction of the board of police by the repealing act deprived its creditors of their action at law against it for the enforcement of their demands, and left them without remedy except in a court of equity; which, * * * will lay hold of its property and administer it for their benefit. Judgment at law and fruitless execution are not required, because impossible, in the absence of an existing debtor. * * * And it has been held by this court (the Supreme Court) that by the French jurisprudence which prevails in Louisiana, a creditor may exercise the right of action of his

debtor and that 'the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States, and all existing rights, in any State of the Union, ought to be suable in some form in those courts.' New Orleans *vs.* Gaines, 131 U. S., 191–213."

The Supreme Court distinctly states that the above are the grounds of equitable cognizance relied upon. I read from their opinion, U. S., page 428 *et seq.:*

"The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed could not be enforced at law or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. Broughton *v.* Pensacola, 93 U. S., 266, 268; Meriwether *v.* Garrett, 102 U. S., 472, 527. Indeed, it was expressly averred that the State courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the supreme court of Louisiana in that behalf. Harrison *v.* City of New Orleans, 40 La. Ann., 509. The contention was that the holders of these warrants had a right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. Therefore the court in chancery was appealed to to lay hold of the assets of the board as in the nature of a trust fund and apply them to the payment of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies and the taxes collected. These were the means provided by law for the payment of debts created by the board, and if they were left unaffected by the repealing act the alleged impairment had no basis to rest on. That act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts if existing laws were ample to effect that purpose. In that view the city of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the board. Although the creditors could not avail themselves of the instrumentality of the board to sue for the apportionments (if that could ever have been done) still, as those apportionments had all been made and taxes had been levied and were in course of collection to pay them, or so much thereof as was

needed to pay the warrants and certificates, the act of 1877 left the city of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been."

"In New Orleans *vs.* Gaines, administrator, 131 U. S., 191, it was held that under the jurisprudence prevailing in Louisiana a creditor might exercise the right of action of his debtor, a right analagous to the garnishee or trustee process in some States, and that this right could be enforced in a Federal court by a suit in equity on the principle of subrogation. But if this bill could be maintained on the doctrine therein recognized, or if the equitable principle of apportionment as between parties charged with a common burden were applicable as justifying equity interposition, the result on the point under consideration would be the same. Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies and tax collections and that the State courts would so decide. And the bill made no such specific averments with which, indeed, many of its allegations were wholly inconsistent; while the defence of the city not only rested on no such ground, but
22 the answer denied that the repealing act was susceptible of that construction or could be given that effect."

"This would be equally true if, as suggested by counsel for the city, the board could never have been treated as a debtor (unless it had collected taxes under act No. 16 of 1875, and retained them), inasmuch as it had nothing to do with raising the sums apportioned to the local authorities, upon whom alone the duty was devolved to accomplish that through the exercise of the power of taxation, and the holders of warrants and certificates could from the first only have resorted to the police fund created through the medium of the annual apportionments."

I also read from the opinion of the Supreme Court, 153 U. S., page 432:

"We have seen that the ground of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. It is insisted that the city stands in the position of a debtor for taxes collected on police board apportionments and for the amount of the apportionments themselves, so far as outstanding. If this were so, and the police board were still in existence and liable to suit, then complainants would be obliged to recover judgment against the board and proceed against the city by way of creditor's bill to enforce the collection. Granting that this could be done without judgment after and because the board had ceased to exist, nevertheless the claims of complainants must be established under the bill precisely as they would have to be in an action at law. Although it is ingeniously said that the suit is one to 'establish a fund,' this does not change the fact that it is a suit to

recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is, in this instance, only another name for the ascertain-
23 ment of an indebtedness of the city to the board, available to the creditors of the board, after their claims as such are judicially determined."

I read further from the opinion of the Supreme Court, 153 U. S. page 435:

"If the board had not been abolished, judgment could not have been recovered against it by complainants in the circuit court; and if a judgment had been recovered by them in the State court, a creditor's bill would have been merely ancillary to the judgment, and could not have been entertained in the circuit court as an original bill. Upon the facts appearing in this record, the assignees would have acquired no new and independent right of recovery, by reason of the judgment, not possessed by the assignors. The board being abolished, recovery of a judgment was dispensed with, but the establishment of the claims was still required as the basis for further relief, and that relief involved nothing more than recovery over, or a direct decree within the principles of New Orleans *vs.* Gaines' Admr., *supra*, analogous to judgment on garnishee process. The suit must, therefore, be regarded as a suit to enforce the payments of the warrants and certificates, and as such, a suit to recover their contents, and this is so on any other ground of equity jurisdiction, which has been suggested."

"In our judgment the pleadings show a suit to recover the contents of choses in action, and, as the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made, (from the statement accompanying the certificate it appears affirmatively that it could not), the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship."

Why did not the Supreme Court answer all the questions? Because the opinion indicates that the court believed it had finally disposed of the case by answering the first and third questions and by strongly intimating its opinion as to the second.

The Supreme Court had clearly said that the case was not
24 a suit in equity arising under the Constitution of the United States. It had clearly stated that the only grounds of equitable cognizance contended for were untenable. It had clearly characterized the case as being a suit for the recovery of the contents of choses in action, and as the court of appeals has certified to the Supreme Court that the assignors of the complainant were citizens of Louisiana (153 U. S. page 417), the Supreme Court, at the close of their opinion (153 U. S. page 435) said, as already stated:

"As the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made (*from the statements accompanying the certificate it 'appears affirmatively that it could not'*)—(the underlining is mine), the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship."

Virtually the only one of the four questions which the Supreme Court left unanswered is the fourth, which inquires whether the city of New Orleans is liable beyond the taxes assessed and collected. In my judgment it is clear that the reason of the Supreme Court for failing to answer that question was that by answering the other questions the court considered the case finally disposed of. In other words, having found that the only grounds of equitable cognizance contended for were untenable and that the suit was a suit to recover the contents of choses in action, and finding further, upon the statement of the Court of Appeals, that there was no diverse citizenship in the case, it was idle to deal with the fourth question.

To sustain the demurrer and dismiss the bill, I need go no further than to say that the complainant has not complied with the order of the court of appeals. He has not made the jurisdiction of this court appear affirmatively. In fact, according to the statement of the court of appeals to the Supreme Court, the complainant cannot make the jurisdiction appear. He should have named the States of which the certificate-holders were citizens. The diverse citizenship is the jurisdictional basis of this case. It is an issuable fact.

I am clear that the demurrer must be sustained and the bill dismissed.

25 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

WEDNESDAY, *April* 8, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

This cause was regularly called this day and submitted to the court after argument by Mr. Jno. D. Rouse for the appellant and by Mr. Branch K. Miller for the appellee.

26 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

TUESDAY, *April* 28, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this

cause be, and the same is hereby, affirmed without prejudice to the right of the plaintiff to sufficiently present his cause, if any he has, in the court having jurisdiction.

It is further decreed that the appellant, Henry W. Benjamin, and the surety on the appeal bond herein, J. D. Rouse, be condemned *in solido* to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

27 And afterwards, to wit, on the 18th day of May, 1896, an assignment of error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Fifth Circuit.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS. } No. 466.

And now comes Henry W. Benjamin, complainant and appellant, and with his motion for appeal herein from the judgment and decree rendered on the 28th day of April, 1896, makes the following assignment of errors:

28 First. Said circuit court of appeals erred in holding that in order to give jurisdiction of complainant's bill to the circuit court it was necessary for the complainant to aver that the assignors of the certificates on which he sues as assignee *was* such at the time the assignment was made as would have enabled them to sue in the circuit court if no assignment had been made.

Second. Said court erred in holding that in order to show jurisdiction in the circuit court, in which complainant's suit was brought, it was necessary to set out and aver specially of what particular State each of the several assignors of complainant's certificates were citizens at the time the suit was brought.

Third. That said court erred in affirming the decree of the circuit court dismissing the bill for want of jurisdiction, when it ought to have reversed the decree in all respects and remanded the case with directions to proceed according to law.

Wherefore, for the errors assigned and others manifest in the record, said complainant prays that said decree of said circuit court of appeals, as well as the decree of said circuit court, be reversed and that the case be remanded to the circuit court of the United States for the fifth circuit and eastern district of Louisiana with directions to proceed according to law.

(Signed) J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

Endorsed: Filed May 18, 1896. J. M. McKee, clerk.

29 United States Circuit Court of Appeals, Fifth Circuit,
November Term, 1895.

MONDAY, *May* 18, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN
v.
THE CITY OF NEW ORLEANS.

On motion of John D. Rouse and William Grant, solicitors for Henry W. Benjamin, complainant and appellant, suggesting that he is advised and believes that there is error to his prejudice in the decree of this honorable court made during the present term, to wit, on the 28th day of April, 1896, in the above-named case, and that he has a right to appeal to the Supreme Court of the United States for the correction of said error, of which he has made and filed assignment herewith—

It is ordered that he be granted an appeal from said judgment and decree to the Supreme Court of the United States, returnable within thirty days, on his giving bond in the sum of five hundred dollars for the payment of costs of said appeal and conditioned as the law directs.

30 And afterwards, to wit, on the 23d day of May, 1896, an appeal bond was filed in said cause in the words and figures following, to wit:

UNITED STATES OF AMERICA:

Know all men by these presents that we, Henry W. Benjamin, as principal, and —— ——, as surety, are held and firmly bound, jointly and severally, unto the City of New Orleans in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said City of New Orleans and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 23rd day of May, in the year of our Lord eighteen hundred and ninety-six.

Whereas the said Henry W. Benjamin having heretofore, to wit, on the 18th day of May, 1896, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 28th day of April, 1896, by the United States circuit court of appeals for the fifth circuit, in the suit of Henry W. Benjamin *vs.* The City of New Orleans, No. 466 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Henry W. Benjamin shall prosecute his said appeal to effect and shall answer all costs if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain
31 in full force and virtue.

(Signed) HENRY W. BENJAMIN, [L. S.]
By J. D. ROUSE, *His Att'y.* [L. S.]
(Signed) ISIDORE NEWMAN, SR. [L. S.]

Signed, sealed, and delivered in the presence of—
—— ——.

Bond approved.

(Signed) DON A. PARDEE,
Circuit Judge 5th Circuit, Presiding in Circuit Court of Appeals.

Endorsed: Filed May 23, 1896. J. M. McKee, clerk.

32 *Opinion of the Court.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

(Filed April 28, 1896.)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee. } No. 465.

Appeal from the United States circuit court, eastern district of Louisiana.

Before McCormick, circuit judge, and Boarman and Speer, district judges.

SPEER, district judge, delivering the opinion:

33 In this cause the averments upon which plaintiff relied to maintain the jurisdiction of court are made in the following amendment: "By leave of court first had and obtained, the complainant comes now and amends his bill herein by inserting at the end of the sixteenth paragraph and before the seventeenth paragraph thereof, on page 14 of said bill, the following averment, viz: 'And your orator avers that *each* of said persons in whose favor said claims accrued and to whom said certificates were issued are now and were on the 9th day of Feb., 1891, citizens respectively of States other then the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness represented by said certificates, if no assignment or transfer thereof had been made.'

Wherefore complainant prays as he hath already prayed, and that

said defendants be required to answer this amendment on or before the next rule day, and for general relief.

(Signed) ROUSE & GRANT,
Solicitors for Comp'l."

The circuit court upon demurrer to the bill held that the proper diversity of citizenship to give jurisdiction was not properly alleged, and held further that the plaintiff's bill was defective for want of equity. We do not think that the jurisdiction of the circuit court was made to appear. It must affirmatively and plainly appear. The defendant being a corporation of the State of Louisiana, the plaintiff, the assignee of a number of claims transferred to
34 him by persons who were members of the late Metropolitan police of this city, may not sue in the circuit court unless the assignors themselves could have sued, if no assignment or transfer had been made. The assignors could not have sued unless they had been, at the time of the transfer, in fact, citizens of States other than Louisiana, and it was essential to the jurisdiction of the court that such other State of States be specially designated. The defendant is entitled to actual and definite notice in the plaintiff's pleading of the citizenship or alleged citizenship of each assignor. No fact in the pleadings of the plaintiff in these courts can be more material, for the authority of the court to act depends upon it. It was not sufficient then to say that the assignors were "citizens respectively of States other than the State of Louisiana and competent as such citizens to maintain suit in this court."

Jurisdiction cannot be inferentially averred. Brodley *v.* Rhines, 8th Wallace, 393; Metcalf *v.* Watertown, 128 U. S., 586; Parker *v.* Ormsby, 141 U. S., 85; New Orleans *v.* Benjamin, 153 U. S., 411; Howes *v.* Hunt & Strevell, circuit court of appeals, 5th circuit, decided at this term.

With relation to the decision of the circuit court that the plaintiff's bill was without equity, it is enough to say that since the court had no jurisdiction whatever of the parties, that holding was, we think, superfluous. It was enough to sustain the demurrer, because the necessary diversity of citizenship was not properly alleged.

We therefore affirm the judgment of the circuit court without prejudice to the right of plaintiff to sufficiently present his cause, if any he has, in a court having jurisdiction.

35 United States Circuit Court of Appeals, Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 35 pages, numbered from 0 to 34, inclusive, contain a true copy of the record, pleas, process, proceedings, and all papers in the case of Henry W. Benjamin, appellant, *v.* The City of New Orleans, appellee, No. 466, November term, 1895, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 15 day of June, A. D. 1896.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,319. U. S. circuit court of appeals, 5th circuit. Term No., 188. Henry W. Benjamin, appellant, *vs.* The City of New Orleans. Filed June 17, 1896.